(1) Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DENNIS BLACKMAN,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

Petition for Writ of Certiorari to the
Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

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WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PROHIBITS A STATE FROM PROSECUTING AN ACCUSED AT A SUBSEQUENT TRIAL FOR AN OFFENSE WHICH AROSE OUT OF THE SAME TRANSACTION AS A CRIME FOR WHICH THE ACCUSED WAS PREVIOUSLY TRIED?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Dennis Blackman respectfully requests that a Writ of Certiorari be issued to review the judgment of the Missouri Supreme Court entered on May 26, 1998, and affirmed on June 16, 1998, when the Missouri Supreme Court denied the Motion for Rehearing.

OPINION BELOW

The opinion affirming the trial court's order denying Petitioner's motion to dismiss for violation of the Double Jeopardy Clause is not yet reported at *State of Missouri* v. *Dennis Blackman*, ____S.W.2d____(1998), but is included in the Appendix, *infra*, as Exh. A. Blackman's Motion for Rehearing is included in the Appendix as Exh. B. The order denying the Motion for Rehearing was entered on June 16, 1998, and is found in the Appendix as Exh. C.

JURISDICTIONAL STATEMENT

The Missouri Supreme Court issued its opinion on May 26, 1998. Petitioner filed a timely Motion for Rehearing. Pursuant to Supreme Court Rule 13.1, the present petition for Writ of Certiorari was required to be filed within ninety days of the order denying the Motion for Rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...

The Fifth Amendment and Fourteenth Amendment to the United States Constitution provide in pertinent part:

. . . nor be deprived of life, liberty or property without due process of law...

STATEMENT OF THE CASE

Petitioner Dennis Blackman was originally charged in St. Louis County Circuit Court Case No. 91CR-1060, with first degree murder and armed criminal action for the murder of St. Louis County Police Officer Joann Liscombe. Both counts were joined in an indictment filed March 28, 1991.

Prior to trial, the defense did not contest the joinder of counts, and on June 1, 1992, trial commenced on both counts of the indictment. In chambers prior to the start of voir dire, the trial court informed counsel that the venire panel would be instructed that the trial involved charges for the "crimes of Murder in the First Degree and Armed Criminal Action involving the murder of one Joann Liscombe." Tr.I,49.[1] The court instructed the panel of sixty (60) persons in that manner. Tr.I,50. Later in the voir dire proceedings, the sixty (60) members of the panel were questioned in smaller groups of eight (8) persons. The court instructed the smaller panels that Mr. Blackman was charged with Murder in the First Degree. The court did not, however, repeat the language regarding the armed criminal action charge as had been its earlier characterization of the charges.

During the trial, one of the state's witnesses testified concerning his execution of the arrest warrant. Upon questioning as to what Mr. Blackman had been charged with, the witness stated: "I read that he was being charged with Murder in the First Degree and Armed Criminal Action for the murder of Officer Liscombe." Tr.VIII, 2049. After further questioning of the witness, defense

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[1]Transcript references are to volumes of the trial transcript made part of the record in Blackman's appeal from his second degree murder conviction, in Missouri Court of Appeals No. 62446.

counsel moved for a mistrial and the following exchange occurred between the court, the prosecutor and defense counsel:

> MR. ROSENBLUM: I will ask -- make a record at this point ask for a mistrial, the jury just heard from this officer that Dennis Blackman was charged with Murder in the First Degree and Armed Criminal Action. He was not charged with Armed Criminal Action. I don't believe you can be charged with Armed Criminal Action in the death penalty --
>
> MR. McCULLOCH: Judge, he can be and is charged with Armed Criminal Action. I think the jury -- the very first instruction it was told to them.
>
> THE COURT: I inadvertently told the entire panel of the original sixty, because I mistakenly believed he was being tried for Murder in the First Degree and Armed Criminal Action.
>
> MR. McCULLOCH: I don't think there can be any prejudice to the defendant because the charge will not be submitted to the jury.
>
> THE COURT: Well, I can just tell you at this point I'm not mistrying the case over that comment. I don't think the level of prejudice rises to demanding a mistrial.
>
> MR. ROSENBLUM: I would ask the Court to instruct the jury that he's not being charged with Arm[ed] Criminal Action.
>
> MR. McCULLOCH: Well, it's up to you.
>
> THE COURT: Certainly I can do that at this point in time, I think you're highlighting it. It's not being tried.
>
> MR. McCULLOCH: He is charged with it.

THE COURT: He isn't being tried.

Tr.VIII, 2050-51.

The transcript does not reflect anything further with regard to the disposition of Count II for Armed Criminal Action before the case was submitted to the jury. On June 13, 1992, the jury found Mr. Blackman guilty of the lesser offense of Murder in the Second Degree. On July 16, 1992, Blackman was sentenced to life imprisonment. Blackman appealed his conviction and the judgment was affirmed in *State of Missouri v. Dennis Blackman*, 875 S.W.2d 122 (Mo. App. 1994).

Shortly after the mandate was issued by the Court of Appeals, the trial court set a scheduling conference on Count II of the indictment in Case No. 91CR-1060. On September 30, 1994, Blackman filed a Motion to Dismiss pertaining to Count II, and the court docket reflects that on December 8, 1994, an order "severing" the count for trial was filed. The state filed a memorandum in opposition to the motion to dismiss. At hearing on the motion, the court made a record that sometime prior to the taking of evidence at the earlier trial, the parties "understood" that the armed criminal action charge would not be tried at that time but would be held in abeyance and dealt with at a later date.

On February 16, 1995, the trial court denied Blackman's Motion to Dismiss Count II, finding that the Double Jeopardy Clause was not a bar to prosecution of the armed criminal action count.[2]

On July 11, 1997, Blackman appeared before the trial court, waived his right to a jury trial, and, submitting the charge on the record from the previous trial, was found guilty by the court of

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[2] Blackman thereafter filed a Petition for Writ of Mandamus in the Missouri Court of Appeals and in the Missouri Supreme Court. Both were denied.

armed criminal action in the killing of Joann Liscombe. He was sentenced to a term of life to be served consecutively to the term of life he received for the murder conviction. Blackman appealed his conviction on the basis of double jeopardy. The conviction was affirmed and his subsequent motion for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD REVISIT AND CLARIFY *UNITED STATES V. DIXON*, 509 U.S. 688 (1993) AND RECONCILE IT WITH *STATE OF MISSOURI V. HUNTER*, 459 U.S. 359 (1983), IN THE CONTEXT OF A CASE WHERE A DEFENDANT HAS BEEN PROSECUTED, CONVICTED, SENTENCED AND PUNISHED FOR ONE OFFENSE, THEN IS RECHARGED WITH ANOTHER OFFENSE WHICH IS BASED ON THE SAME CONDUCT AS THE PRIOR OFFENSE.

In its opinion, the Missouri Supreme Court held that *United States v. Dixon*, 509 U.S. 688 (1993) "broadens" the reach of *State of Missouri v. Hunter*, 459 U.S. 359 (1983), effectively permitting an accused to be tried in two successive proceedings for crimes arising out of, or part of, the same conduct, provided that state statute allows for consecutive or separate punishment of the crimes. Because *Dixon* does not explicitly broaden *Hunter* or otherwise address this question, and because permitting successive trials for the same conduct may run afoul of the Fifth Amendment protection against double jeopardy, the Court must revisit and clarify *Dixon* in this context.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The proscription against double jeopardy represents a constitutional policy of finality for a defendant's benefit in criminal proceedings and protects against prosecutorial overreaching. *See e.g.*, *United States v. Jorn*, 400 U.S. 470, 489; *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980). The Double Jeopardy Clause protects against subsequent prosecution for the same offense following an acquittal, conviction or mistrial which was not the result of manifest necessity. *United States v. DiFrancesco*, *supra*. Moreover, the protection prohibits both multiple pros-

ecutions and multiple punishments for the same criminal offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

In the context of multiple punishment and multiple prosecution, this Court concluded in *Blockberger v. United States*, 284 U.S. 299 (1932), that the double jeopardy bar applies where the two offenses for which the defendant was either tried or punished fails the "same-elements" test. The test inquires whether each offense contains an element not contained in the other; if not, they are the "same offense" and double jeopardy normally bars additional punishment and successive prosecution. *See, United States v. Dixon*, 509 U.S. 688, 695 (1993).

Subsequently, in *State of Missouri v. Hunter*, 459 U.S. 359 (1983), the Court examined the question as to what constitutes a single offense for the purpose of multiple punishments imposed in a single trial. The Court in *Hunter* observed that the legislature, in defining offenses and the punishments therefor, may intend that separate statutory offenses be punished separately. Where the legislature has expressed its intent that two separate statutory offenses are each to be punished, the courts need not examine whether the two separate statutory offenses are the "same offense" under *Blockberger*. *Hunter*, 459 U.S. at 365. *Hunter*, however, can be read as limited to its facts, permitting multiple punishment but only in the context of a *single* trial. *Hunter* did not address the constitutional permissibility of consecutive punishment *at consecutive trials*.

In line after *Hunter* came the decision in *United States v. Dixon*. *Dixon*, like *Hunter*, was a narrow case. In a plurality opinion, Justice Scalia rejected the short-lived "same conduct" test set forth in *Grady v. Corbin*, 495 U.S. 508 (1990), reverting to the old "same-elements" test first enunciated in *Blockberger*. While *Dixon* overruled *Grady*, it did not clearly give us a new test for double jeopardy *to be used in all types of cases*. And while it did not disturb the holding in *Hunter*, it also did not extend it.

Indeed, it becomes evident in reading the *Dixon* opinion, with its five concurring and dissenting opinions, that this Court as a whole is not entirely comfortable with such a simplistic rule in the area of double jeopardy protection. Moreover, Justice Scalia, in his opinion, expressed his own reluctance and ambivalence in overruling the *Grady* test. Although Justice Scalia's plurality opinion seems to revert to the more rigid "same elements" test of *Blockberger*, a closer scrutiny of his opinion discloses an analysis somewhere between the "same conduct" test of *Grady* and the "same elements" test.

The opinion in *Dixon* covered 78 pages, with five justices writing separately. Such an opinion clearly indicates that the Court is not in substantial agreement with the state of the law in this area and it has not spoken with a coherent voice. Moreover, the narrow questions defined and examined by Justice Scalia for the plurality were: 1) whether Blockberger analysis permits subsequent prosecution, where an accused is tried and convicted for criminal contempt for violating a civil order of protection, then tried again for common criminal assault for the same acts of abuse on his spouse, and 2) whether such successive trials are permitted by *Grady*. Reasoning that the contempt offense required proof of knowledge of the CPO, where assault does not, Justice Scalia determined that the offenses were not the same and were therefore not *Blockberger*-barred. He also determined that, because *Blockberger* had "deep historical roots and has been accepted in numerous precedents in this Court", and *Grady* "lacked constitutional roots", *Grady* was overruled. *Dixon*, 509 U.S. at 704.

In *United States v. Dixon, supra*, at least four Justices, and possibly five, actually examined the content of the particular court order violated by the defendant rather than the more general statutory elements of the criminal contempt provision under which he was charged in determining whether the subsequent prosecution should be barred. Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, concurring in part and

dissenting in part, disagreed with Justice Scalia's application of *Blockberger* and stated that, despite what Justice Scalia claimed, his analysis was more of a "same evidence" test, rather than a "same elements" test, to which Chief Justice Rehnquist subscribes. Chief Justice Rehnquist stated:

> . . . Justice Scalia's double-jeopardy analysis bears a striking resemblance to that found in *Grady*-not what one would expect in an opinion that overrules *Grady*.

Dixon, 125 L.Ed.2d at 581. Therefore, there is no clear majority supporting one interpretation of *Blockberger* over the other, nor is there a consensus whether *Blockberger* should be universally applicable.

Notwithstanding the disagreement among the Court itself on the use and breadth of the *Blockberger* test, it is still undecided whether *Blockberger* can be forsaken altogether of double jeopardy analysis, where the state legislature authorizes consecutive punishment for separate statutory offenses, *but where the offenses are tried in piecemeal fashion* at separate and subsequent trials.

Protection from unending litigation or continuous prosecution also has deep historical roots in our jurisprudence. The protection is compelling, as the Court has explained.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, (1957). See also Justice Brennan's concurring opinion in *Ashe v. Swenson*, 397 U.S. 436, 453-54 (1970), which states in pertinent part,

> In my view, the Double Jeopardy Clause requires the prosecution, except in the most limited circumstances, to join at one trial all charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction.

One could make the argument that, if the *Blockberger* test were invoked in a case such as Blackman's, where he was prosecuted at one trial for murder then prosecuted separately for using a gun in the commission of that murder, the second trial would be barred as offending double jeopardy.[3] This is because the "same-elements" test does not always take a pure form, but has been extended in several contexts to prohibit successive prosecution.

Such an analysis is supported by the type of reasoning found in *Harris v. Oklahoma*, 433 U.S. 682 (1977), *Brown v. Ohio*, 432 U.S. 161 (1977) and *Ashe v. Swenson*, 397 U.S. 436 (1970), all of which effectively recognize extensions of the pure *Blockberger* "same-elements" test. Ironically, Justice Scalia relied heavily on *Harris* in reaching his conclusion that *Grady* must be overruled.

In *Harris*, the Court held that a defendant, who had been prosecuted for felony-murder committed during a robbery, could not be prosecuted for the robbery because the robbery and the felony-murder constituted the same offenses. Although the

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[3] Section 571.015.1, RSMo 1986, provides:

> [A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action...The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon...

Second degree murder, for which Blackman was convicted, is defined in Missouri as knowingly causing the death of another or with the purpose of causing serious physical injury, causing the death of another. Section 565.021 RSMo (1986).

elements of the robbery were not specified in the felony-murder statute, they were incorporated in the statute through its requirement that the prosecution prove a felony. *Harris'* holding is consistent with the *Blockberger* test if viewed in a common sense way, that is, if the totality of the circumstances is considered. Two offenses are the same for purposes of double jeopardy if one offense wholly encompasses the other even if the "elements" are not technically the same. The felony-murder statute under which *Harris* was prosecuted did not mention robbery, though it required proof of the lesser offense to establish guilt of the greater.

Similarly, in *Brown v. Ohio, supra*, an expanded version of *Blockberger* was applied by looking at the proof as well as the elements of the offense. Brown had been prosecuted in one Ohio county for joyriding in a stolen car on December 8, 1973, and was later prosecuted in another Ohio county for the original theft of the car as well as joyriding on November 29, 1973. A technical application of the "same elements" test could have led to the conclusion that these prosecutions were not for the same offense because each required proof of events on a different date; each thus required proof of an element (i.e., the specific date in question) not required by the other. However, the Court rejected that interpretation and held that the two offenses were the same for double jeopardy purposes. The Court recognized that the overlap in the evidence coupled with the substance of the offenses created a "same offense" situation even if technically the crimes involved different "elements."

And *Ashe v. Swenson, supra*, held that the *Blockberger* "same-elements" test would be relaxed where the second prosecution would require relitigation of "factual issues" that were necessarily resolved in the defendant's favor in the first prosecution, even though the second prosecution involved additional "elements."

These decisions establish two significant aspects of double jeopardy analysis as it existed prior to *Grady*. First, they clarify

that the double jeopardy bar is multidirectional. Prosecution for the more serious offense bars subsequent prosecution for a lesser offense, and prosecution for the minor offense bars subsequent prosecution for the more serious offense. Secondly, and more importantly, they demonstrate that when a comparison of elements does not reveal offenses to be the same, the Court will still look at the totality of the circumstances to determine whether two prosecutions are effectively for the "same offense." The totality of the circumstances produced a double jeopardy bar in these "pre-*Grady*" cases, despite the fact that the offenses consisted of different "elements."

The Court's decision in *Illinois v. Vitale*, 477 U.S. 410 (1980) further indicates the sometimes necessary expansion of the pure *Blockberger* "same-elements" test.

In *Vitale*, the defendant was involved in a car accident that resulted in two deaths. Vitale was convicted of failing to reduce his speed to avoid an accident, and the state subsequently prosecuted him for reckless homicide on the basis of the same traffic mishap. The Supreme Court first discussed whether the statutes in question satisfied the *Blockberger* test. The Illinois Supreme Court had stated that "the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter," but the opinion did not say whether proof of reckless homicide would always prove failure to reduce speed. Therefore, the Supreme Court held that it was unclear whether the two offenses were greater and lesser offenses under the *Blockberger* test, as applied in *Brown*, and remanded the case to the state court to make that determination. The Court stated, however, that regardless of the outcome of the *Blockberger* test, "if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy."

Blackman's use of the weapon, which was the subject matter of his armed criminal action conviction, was a necessary component of the murder of Joann Liscombe. Blackman's use of the weapon enabled him to commit the murder. However, it is not for this Court to determine whether *Blockberger* bars or permits Blackman's prosecution on the armed criminal action charge: This Court must decide whether *Blockberger* is even to be invoked. Petitioner submits that notwithstanding the Missouri Supreme Court's determination that *Dixon* broadens *Hunter*, this Court must speak to whether Blackman's subsequent prosecution was constitutionally permissible.

CONCLUSION

Petitioner respectfully asserts that neither *State of Missouri v. Hunter* nor *United States v. Dixon* explicitly permit the piecemeal prosecution of a murder offense and the use of the weapon to commit that offense. Moreover, if the *Blockberger* test is to be invoked in this context, it should be extended beyond its pure or rigid form, to bar a subsequent trial.

Petitioner respectfully requests that this Petition for Writ of Certiorari be granted and that, upon briefs and argument before this Court, the judgment of the Missouri Supreme Court be reversed and remanded for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of September, 1998, three copies of the foregoing was served by mail, postage prepaid, to Jay Nixon, Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102.

APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
en banc

No. 80617

STATE OF MISSOURI,
Respondent,

vs.

DENNIS A. BLACKMAN,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

The Honorable James R. Hartenbach, Judge

[Filed: May 26, 1998]

PER CURIAM[1]

Dennis A. Blackman was charged by a single indictment with two counts, first degree murder under section 565.020, RSMo 1986, and armed criminal action under section 571.015, RSMo 1986, for the death of St. Louis County police officer Joann Liscombe. The counts were severed. On the murder count, Blackman was convicted of murder, second degree, pursuant to section 565.021, RSMo 1986. This conviction was affirmed. *State v. Blackman,* 875 S.W.2d 122 (Mo. App. 1994).

Blackman subsequently was tried on the armed criminal action court. He was convicted and sentenced to a term of life imprisonment to be served consecutively to the term of life

[1] The appeal in this case was originally decided by the Court of Appeals, Eastern District, in an opinion written by the Honorable Mary K. Hoff. Following transfer to this Court, the court of appeals opinion, as modified, is adopted as the opinion of this Court.

imprisonment imposed on his second degree murder conviction. Blackman now appeals from the armed criminal action conviction and sentence on the basis of double jeopardy.[2]

In his only point on appeal, Blackman contends the trial court erred in denying his motion to dismiss the armed criminal action charge. Blackman asserts that the armed criminal action offense incorporates all the elements of the underlying felony of murder in the second degree. He contends that the armed criminal action count could have been tried with the murder count and any subsequent prosecution on the armed criminal action count violated the double jeopardy clause of the federal constitution.[3]

Blackman argues that under *Missouri v. Hunter*, 459 U.S. 359 (1983), the state was required to try him on both counts of murder and armed criminal action in one trial, not successive trials. In *Hunter*, the Supreme Court of the United States held that where a legislature specifically authorizes cumulative punishment under two statutes, cumulative punishment may be imposed against a defendant in one trial. *Id.* at 368-69. As a result, the Court found defendant's prosecution for armed criminal action and first degree robbery in one trial did not constitute double jeopardy. *Id.*

Blackman also relies on *State ex rel. Bulloch v. Seier*, 771 S.W.2d 71 (Mo. banc 1989), and *State v. Morris*, 805 S.W.2d 347 (Mo. App. E.D. 1991), which held a successive prosecution or armed criminal action after a prosecution for murder violated the double jeopardy clause.

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[2] Because the facts of the crime at not at issue, we will not discuss them here. For a detailed discussion of the facts, see *State of Missouri v. Blackman*, 875 S.W.2d 122 (Mo. App. 1994).

[3] The double jeopardy clause of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

In *Bulloch,* the defendant was first tried for murder in the first degree for the death of his wife. *Bulloch,* 771 S.W.2d at 71. The jury found the defendant guilty of the lesser included offense of involuntary manslaughter. *Id.* at 71-72. After that homicide trial, defendant was indicted and tried on additional charges, including armed criminal action arising out of his wife's death. *Id.* at 72. The Supreme Court of Missouri held that, because the armed criminal action charge was not tried with the underlying felony in one proceeding, subsequent prosecution of that charge violated the double jeopardy clause. *Id.* at 75.

In *Morris,* the defendant was charged in an information with two counts, first degree murder and armed criminal action, for the killing of his wife. *Morris,* 805 S.W.2d at 348. Prior to trial, the two counts were severed, and defendant was tried only on the murder in the first degree counts, for which the state sought the death penalty. The jury convicted defendant of voluntary manslaughter. Defendant moved to dismiss the armed criminal action charge, and the trial court sustained his motion. The court of appeals, relying on *Bulloch,* affirmed the judgment and held "cumulative punishments for the same offense can be assessed only if they arise in the same proceeding." *Id* at 348.

Subsequent to *Hunter, Bulloch,* and *Morris,* the Supreme Court of the United States decided *United States v. Dixon,* 509 U.S. 688 (1993). In *Dixon,* the Court held "same offense" no longer had a different meaning in a "successive prosecution" context than in a "successive punishment" context. *Dixon,* 509 U.S. at 704. The court concluded, the government "is entirely free to bring [same offenses to trial] separately, and can win convictions in both."[4] *Id.* at 705.

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[4] The Court noted the government may be collaterally estopped from bringing a "later prosecution for a separate offense where the [g]overnment has lost an earlier prosecution involving the same facts." *Dixon,* 509 U.S. at 705. This, however, was not at issue in *Dixon* and is not at issue in the case before us.

In *Dixon* the Court also reaffirmed the "same offense" test set forth in *Blockburger v. United States,* 284 U.S. 299 (1932). The *Blockburger* test asks whether each offense requires proof of an additional element that the other offense does not; if each offense does not require proof of an additional element, then a successive prosecution would be considered double jeopardy. *Blockburger,* 284 U.S. at 304. In *Hunter,* the Supreme Court of the United States held a court should apply the *Blockburger* test only when there is no clear legislative intent as to whether successive punishment should be imposed. *Hunter,* 459 U.S. at 367-68.

Based on these authorities, our double jeopardy analysis requires a determination of whether there is clear legislative intent to punish a defendant cumulatively for second degree murder and armed criminal action. If the legislature intended that a defendant be successively punished for those offenses, then the state may do so either in a single trial or in separate trials. If legislative intent is clear, then the elements of each crime under the *Blockburger* test need not be examined.

Section 571.015.1, RSMo 1986, provides the following definition of armed criminal action:

> [A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action . . . . The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon.

Because this statute expressly states punishment for armed criminal action is "in addition to" other punishment defendant may receive for the felony committed, it clearly establishes the legislature's intent to provide for successive punishment for those crimes.

Section 565.004, RSMo 1986,[5] states the following, in pertinent part:

> 1. Each homicide offense which is lawfully joined in the same indictment or information together with any homicide offense or offense other than a homicide shall be charged together with such offense in separate counts. A count charging any offense of homicide may only be charged and tried together with one or more counts of any other homicide or offense other than a homicide when all such offenses arise out of the same transaction or constitute part of a common scheme or plan. Except as provided in subsections 2, 3, and 4 of this section, no murder in the first degree offense may be tried together with any offense other than murder in the first degree.
>
> 2. A count charging any offense or homicide of a particular individual may be joined in an indictment or information and tried with one or more counts charging alternatively any other homicide or offense other than a homicide committed against that individual. . . .

While this statute was interpreted in *Bulloch* and *Morris* to preclude successive prosecution of a homicide offense and an "offense other than homicide when all such offenses arise out of the same transaction or constitute a part of a common scheme or plan,"[6] this distinction between successive prosecution and successive punishment is now moot in light of *Dixon*. *Dixon* broadened the holding in *Hunter* and implicitly overruled *Bulloch* and *Morris*.

Dixon holds, for purposes of double jeopardy analysis, what the state may prosecute in one proceeding, it may prosecute in

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[5] This section was amended in 1994. However, because the 1986 statute applies to this case, the amendment will not be addressed.

[6] Section 565.004.1 RSMo 1986.

successive proceedings when the legislature clearly permits multiple punishments. Because the legislature clearly and expressly provided for successive punishment for both armed criminal action and the underlying felony, in this case murder in the second degree, the state was "entirely free to bring them separately, and can win convictions in both." See *Dixon,* 509 U.S. at 705.

Blackman's conviction for armed criminal action in a separate trial following his conviction for murder in the second degree arising out of the same incident does not constitute double jeopardy. The judgment is affirmed.

Benton, C.J., Price, Limbaugh, Robertson, Covington and Holstein, JJ., and Ulrich, Sp.J., concur. White, J., not sitting.

APPENDIX B

IN THE MISSOURI SUPREME COURT

Cause No. 80617

STATE OF MISSOURI,
Plaintiff,

vs.

DENNIS BLACKMAN,
Defendant.

MOTION FOR REHEARING

[Filed: June 2, 1998]

COMES NOW Defendant, Dennis Blackman, by and through counsel N. Scott Rosenblum, and pursuant to Supreme Court Rule 84.17, respectfully moves for rehearing of the Court's decision in the above referenced case, and opinion having been issued on May 26, 1998. In support thereof Defendant states as follows:

In affirming Defendant's conviction and holding that his successive prosecution for armed criminal action in a separate proceeding from the related murder charge, did not constitute double jeopardy, the Court relies on an expanded reading of *United States v. Dixon,* 509 U.S. 688 (1993). Specifically, the Court construes *Dixon* to "broaden" the holding in *Missouri v. Hunter,* 459 U.S. 359 (1983) and "implicitly overrule" both *State ex rel Bulloch v. Seier,* 771 S.W.2d 71 (Mo. banc 1989) and *State v. Morris,* 805 S.W.2d 347 (Mo. App. 1991). (Slip Op. 6). Defendant submits that this reading of *Dixon* is in error and asks this Court to reconsider its ruling.

In *Missouri v. Hunter, supra,* the Supreme Court held, *narrowly,* that where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether the

two statutes proscribe the same conduct under *Blockberger,* the jury may impose cumulative punishment under such statutes *in a single trial. Hunter,* 459 U.S. at 368.

In *United States v. Dixon, supra,* the Supreme Court held, again narrowly, that it was returning to the test enumerated in *Blockberger v. United States,* 284 U.S. 299 (1982), this is, where a defendant has been subject to multiple punishment for two offenses, the double jeopardy bar applies if the offenses cannot survive the "same elements" test. In determining whether two offenses share the same elements for double jeopardy purposes, the inquiry is whether each offense contains an element not contained in the other. *Dixon,* 509 U.S. at 696-97.

Dixon did not disturb *Hunter,* and in fact, *Hunter* continues to be good law. The holding of *Hunter* endures: a court may apply the *Blockberger* test only where there is no clear legislative intent as to whether successive punishment should be imposed, in a single proceeding. *Hunter,* 459 U.S. at 367-68. Specifically, *Hunter* held,

> With respect to cumulative sentences imposed in a single trial, the double jeopardy clause does no more than prevent the sentencing court from prescribing greater punishment than the legislative intended.

Hunter, 459 U.S. at 678.

In Missouri, it is clear that the legislature has intended cumulative punishment for armed criminal action (ACA) convictions and convictions for the underlying offense, tried in the same proceeding. Section 571.015.1 RSMo (1986). Thus, the *Blockberger* test need not be invoked to determine whether an ACA charge is the "same offense" as the underlying offense, and in fact, it seldom would be. There is, however, no clear legislative intent in Missouri, that charges can be successively prosecuted where they arise out of the same transaction. Neither

Hunter nor *Dixon* addresses this question, whose resolution by the United States Supreme Court will have to wait for another day.

Missouri statute does not explicitly authorize prosecution or conviction for armed criminal action in a separate trial following a conviction for murder arising out of the same incident. *Dixon* doesn't specifically address this issue, and *Hunter* seems to suggest it would be constitutionally barred. Defendant respectfully submits that his conviction for armed criminal action should be reversed because it violates the double jeopardy clause.

Respectfully Submitted,

WITTNER, POGER, ROSENBLUM,
SPEWAK & MAYLACK, P.C.

By: /s/ N. Scott Rosenblum
N. Scott Rosenblum, #4306
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Clayton, Missouri 63105
(314) 862-3535/Facsimile 862-5741

Attorney for Blackman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1 day of June, 1998, a copy of the foregoing was served by mail, postage prepaid, to the Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102.

/s/ illegible

APPENDIX C

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102
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THOMAS F. SIMON
CLERK

JUNE 16, 1998

Mr. N. Scott Rosenblum
Ms. Susan Kister
Suite 400
7700 Bonhomme
Clayton, Missouri 63105

In re: State of Missouri vs. Dennis A. Blackman
Supreme Court No. 80617

Dear Counsel:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled."

White, J., not participating.

Yours very truly,

THOMAS F. SIMON

/s/ Christina S. Vinson
Christina S. Vinson
Deputy Clerk, Count en Banc

cc: Ms. Joanne E. Joiner, Assistant Attorney General